



# **Department of Human Services: Payments for Self-Administered Opioid Treatment Medication**

**SPECIAL REVIEW**  
**October 29, 2019**

**OFFICE OF THE LEGISLATIVE AUDITOR**  
**STATE OF MINNESOTA**

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**OFFICE OF THE LEGISLATIVE AUDITOR**  
STATE OF MINNESOTA • James Nobles, Legislative Auditor

October 29, 2019

Members of the Legislative Audit Commission:

The Office of the Legislative Auditor (OLA) conducted a special review of payments the Department of Human Services (DHS) made to the White Earth Nation and the Leech Lake Band of Ojibwe for clients in their opioid addiction treatment programs to self-administer medications at home.

Because the payments were not authorized, occurred over several years, and total over \$29 million, OLA had a responsibility to determine why DHS made the payments and why the department did not stop them sooner.

Our review was conducted by Jim Nobles, Legislative Auditor; Elizabeth Stawicki, Legal Counsel; Joel Alter, Director of Special Reviews; and Valerie Bombach, Audit Director. The department cooperated fully with our review.

Sincerely,

A handwritten signature in black ink that reads "Jim Nobles".

James Nobles  
Legislative Auditor



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# Department of Human Services: Payments for Self-Administered Opioid Treatment Medication

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## Introduction

The Department of Human Services (DHS) notified the Office of the Legislative Auditor (OLA) on July 9, 2019, that DHS had overpaid the opioid addiction treatment programs operated by the White Earth Nation (White Earth) and the Leech Lake Band of Ojibwe (Leech Lake).<sup>1</sup> In July, DHS estimated the overpayments amounted to \$25 million; recently, the department increased the estimate to nearly \$29 million.<sup>2</sup>

The overpayments were in connection with the tribes' Medication-Assisted Treatment programs to treat opioid addiction. These programs combine counseling with a narcotic known as buprenorphine (brand name, Suboxone®), which reduces cravings and symptoms of withdrawal.<sup>3</sup>

DHS classified these expenditures as "overpayments" because the department paid White Earth and Leech Lake the U.S. Indian Health Service (IHS) "encounter rate" when clients took the treatment drug at home. The department should not have used that rate—currently \$455 per day—because it can only be used when there was a face-to-face interaction between a client and a health care professional within a clinic.<sup>4</sup>

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<sup>1</sup> *Minnesota Statutes* 2019, 3.971, subd. 9, requires state agencies to "promptly" notify the Legislative Auditor when they obtain information indicating that public money or other public resources may have been used for an unlawful purpose. In this case, DHS did not promptly notify OLA; the notice came approximately four months after the department determined that public money had been used for an unlawful purpose.

<sup>2</sup> The initial amounts were based on payments the department made through December 2018. Human Services Commissioner Jodi Harpstead notified Legislative Auditor James Nobles of the revised estimate in a telephone call on September 24, 2019. According to the commissioner, the new amount included a \$2.4 million increase for the White Earth Nation and a \$1.4 million increase for the Leech Lake Band of Ojibwe. The increase was mostly due to payments the department made in 2019 after the department had determined that paying tribes the encounter rate for take-home medications did not comply with state and federal legal requirements.

<sup>3</sup> Buprenorphine is a Schedule III narcotic. According to the U.S. Drug Enforcement Administration, drugs are classified into five different categories (or schedules) based on a drug's potential for abuse. The schedules range from Schedule I drugs, which have the highest potential for abuse and dependence, to Schedule V drugs, which have the least potential for abuse. For details, see <https://www.dea.gov/drug-scheduling>.

<sup>4</sup> 42 CFR, sec. 440.90 (2019); and Department of Human Services, "Minnesota State Plan Amendment, Methods and Standards for Establishing Payment Rates, Supplement 2 to Attachment 4.19-B," approved January 3, 2012, 1.

When a client takes a dose of medication at home, there is no face-to-face encounter with a treatment provider.

According to DHS officials, because the department made the overpayments with federal Medicaid funds, the department has to repay the federal government the full amount of the overpayments. DHS contends that state law requires White Earth and Leech Lake to repay the state.

Given OLA's responsibility to audit DHS and the state's use of Medicaid funds, we decided that OLA had a responsibility to conduct a special review of the issues involved. *Minnesota Statutes 2019, 3.972, subd. 2a*, says:

To ensure continuous legislative oversight and accountability, the legislative auditor shall give high priority to auditing the programs, services, and benefits administered by the Department of Human Services.

In addition, *Minnesota Statutes 2019, 3.971, subd. 6*, says:

The legislative auditor shall see that all provisions of law respecting the appropriate and economic use of public funds and other public resources are complied with and may, as part of a financial audit or separately, investigate allegations of noncompliance.

In this special review, our primary objective was to determine what factors contributed to DHS making the overpayments and why the department did not disclose and stop them sooner. To conduct our review, we examined DHS and federal documents, and we interviewed former and current DHS officials under oath.

While we focused our review on DHS, we also wanted input from the tribes. Therefore, we reached out to the chairman of the White Earth Nation and the chairman of the Leech Lake Band of Ojibwe. We asked to meet with them and other tribal officials. We also asked them to provide us with documents that would help OLA understand the overpayment issue from the tribes' perspectives. They did not respond to our request, and given the fact that American Indian tribes are sovereign nations, OLA's authority to compel their participation in an OLA review was uncertain.

Therefore, we had to rely largely on information we obtained from DHS and other nontribal documents. It is possible that as the overpayment issue continues to unfold, White Earth or Leech Lake will bring forth additional documents and testimony that will be relevant to a full understanding of what occurred.

## Summary

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Over a decade ago, and without authority, DHS officials decided that it would pay opioid treatment providers when their clients took medication at home. A few years later, and again without authority, DHS officials decided it would pay tribal opioid treatment providers the Indian Health Service (IHS) encounter rate when their clients took medication at home.

Who made the decisions, why, and when is not clear because DHS officials never documented their decisions. Even during the interviews we conducted, DHS officials could not recall who was responsible. In addition, none of the DHS officials we interviewed could offer a credible rationale for paying health care providers for their clients taking medications at home.

While some DHS officials took actions that led to the overpayments, there were other DHS officials who could have stopped the payments but did not. In interviews with OLA, some officials said they were unaware of the payments, while others said they were aware but it was not their responsibility to question an established payment practice.

On February 12, 2019, a representative of the Red Lake Nation e-mailed a DHS opioid treatment expert to find out if Red Lake's opioid addiction treatment program could receive the IHS encounter rate for days when clients took treatment medications at home. Red Lake already operated an opioid addiction treatment program, but it had not given its clients treatment medication to take at home.

The DHS expert told Red Lake "yes"; Red Lake would be able to receive the encounter rate when clients took treatment medication at home. But another DHS official copied on the e-mail told Red Lake to wait for an official response.

The department did not, however, issue an official response to Red Lake until May 1, 2019. In a letter to Red Lake, Leech Lake, and White Earth, the DHS commissioner reversed the department's long-standing practice of paying tribes for their clients to self-administer treatment drugs at home. The commissioner told the tribal chairmen that DHS can only pay the IHS encounter rate when there is a face-to-face interaction between a client and a health care professional.

Also on May 1, 2019, the department finally implemented a policy and a payment control that stopped the department from making payments to tribes when clients take medication at home.

The department took another three months to inform the White Earth and Leech Lake tribes that they must return all of the payments their tribes received from DHS for clients self-administering medications at home.<sup>5</sup>

Leaders of the White Earth Nation and the Leech Lake Band of Ojibwe have expressed frustration with how DHS has communicated with them about the overpayment issue. They have placed responsibility for the overpayments on DHS and questioned their obligation to repay the state. The state could face legal challenges in its efforts to require White Earth and Leech Lake to return the overpayments.

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<sup>5</sup> The department also informed the White Earth and Leech Lake tribes that they had a right to dispute the department's determination that any individual payment was unauthorized by evidence that there was a face-to-face encounter between the client and a tribal health care provider. In addition, the department gave the tribes notice that they could appeal the department's determinations and judgments to an independent hearing officer. We will discuss the legal issues involved in Finding 6.

## Conclusion

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Our review found troubling dysfunction at the Department of Human Services, which resulted in the department making \$29 million in overpayments to the White Earth and Leech Lake tribal opioid treatment programs.

The department did not have legal authority to make the payments; it did not document why, when, and who decided it was appropriate to make the payments; no one at DHS takes responsibility for the decision; and no one at DHS can provide a rationale for the payments. The overpayments continued over several years and did not stop until an outside inquiry brought them to light.

The dysfunction we found at DHS has created serious financial and legal problems for the state, the White Earth Nation, and the Leech Lake Band of Ojibwe; those problems will be difficult to resolve.

## Background

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### Opioid Addiction and Treatment

In recent years, opioid addiction has become a major public health crisis. According to the National Institute on Drug Abuse, more than 130 people die each day in the U.S. after overdosing on opioids.<sup>6</sup>

While opioid addiction has become a serious problem nationwide and in every part and population of Minnesota, a recent article in *The Circle: Native American News and Arts* noted its particular impact on American Indians:

Minnesota's crisis with opioid addiction is devastating families and communities across the state and country. Opioids account for more overdoses than any other drug. American Indians are experiencing the effects of the opioid epidemic far more than other Minnesotans.<sup>7</sup>

Opioids include a wide variety of drugs both illegal (such as heroin) and prescribed pain medications (such as oxycodone, morphine, and codeine). Some opioids are made from opium extracted from poppy plants, while others are synthetically created by formulating chemicals into drugs that replicate the effects of natural opium.<sup>8</sup>

According to medical professionals, the process of reducing an addiction to opioids can take significant time and poses significant risks. For example, Mayo Clinic offers this advice: "Opioid withdrawal can be dangerous, and symptoms can be severe.

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<sup>6</sup> See "Opioid Overdose Crisis," National Institute on Drug Abuse, revised January 2019, <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis>, accessed October 18, 2019.

<sup>7</sup> Lee Egerstrom, "Tribes and Public Agencies Spur Efforts to Fight the Opioid Crisis," *The Circle: Native American News and Arts*, April 1, 2019. The quote is a statement made by Richard Latterner, a manager and chemical health counselor at the White Earth Urban Substance Abuse Program in Minneapolis.

<sup>8</sup> For more information about opioids, see Centers for Disease Control and Prevention, *Opioid Basics*, <https://www.cdc.gov/drugoverdose/opioids/index.html>, accessed October 23, 2019.

Depending on the type and dose of drug you've been taking, it may take weeks or even months to gradually and safely reduce your [addiction].<sup>9</sup>

There are various approaches to the treatment of opioid addiction. One approach, Medication-Assisted Treatment (MAT), uses medications specifically formulated to help people reduce or completely taper off of opioid use. The U.S. Substance Abuse and Mental Health Services Administration describes MAT programs as follows:

Medication-Assisted Treatment (MAT) is the use of medications, in combination with counseling and behavioral therapies, to provide a “whole-patient” approach to the treatment of substance use disorders. Research shows that a combination of medication and therapy can successfully treat these disorders, and for some people struggling with addiction, MAT can help sustain recovery.<sup>10</sup>

Medication-Assisted Treatment programs commonly use three types of medication: methadone, buprenorphine, and naltrexone. Because of their potential for abuse and diversion into illicit drug markets, the U.S. government regulates methadone and buprenorphine as “controlled substances.”<sup>11</sup> Our review focused on payments for treatment involving buprenorphine (commonly referred to under the brand name Suboxone®) since this was the take-home medication used in the MAT programs operated by the Leech Lake and White Earth tribes.<sup>12</sup>

Federal requirements for buprenorphine treatment have evolved over time. Prior to 2013, federal regulations required that patients be stable and in treatment for nine months before they were eligible to receive a one-week take-home supply of buprenorphine. Effective in January 2013, however, a physician for an opioid treatment program could determine at any point in treatment (even upon admission) that a patient was suitable to receive take-home medications, and the amount of medication given to patients was not necessarily limited to one week.<sup>13</sup>

In addition, Minnesota law establishes criteria that prescribing physicians must consider when determining whether they will allow their clients to self-administer treatment

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<sup>9</sup> “Tapering Off Opioids: When and How,” Mayo Clinic, <https://www.mayoclinic.org/diseases-conditions/prescription-drug-abuse/in-depth/tapering-off-opioids-when-and-how/art-20386036>, accessed October 23, 2019.

<sup>10</sup> “Medication and Counseling Treatment,” Substance Abuse and Mental Health Services Administration, U.S. Department of Health and Human Services, <https://www.samhsa.gov/medication-assisted-treatment/treatment>, accessed October 18, 2019.

<sup>11</sup> Buprenorphine is a Schedule III narcotic. According to the U.S. Drug Enforcement Administration, drugs are classified into five different categories (or schedules) based on a drug’s potential for abuse. The schedules range from Schedule I drugs, which have the highest potential for abuse and dependence, to Schedule V drugs, which have the least potential for abuse. For details, see <https://www.dea.gov/drug-scheduling>.

<sup>12</sup> The U.S. Food and Drug Administration (FDA) approved buprenorphine in 2002.

<sup>13</sup> H. Westley Clark, Director, Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, “Dear Colleague” letter regarding federal regulatory changes effective on January 7, 2013, November 21, 2012.

medications.<sup>14</sup> The stated purpose of these criteria is to “limit the potential for diversion” of these medications “to the illicit market.”<sup>15</sup>

## Leech Lake and White Earth Opioid Medication-Assisted Treatment Programs

The White Earth Nation and the Leech Lake Band of Ojibwe are bands within the Minnesota Ojibwe (Chippewa) Tribe.

The Leech Lake Band of Ojibwe reservation in northern Minnesota includes land in Beltrami, Cass, Hubbard, and Itasca counties. The White Earth reservation in northern Minnesota includes land in Becker, Clearwater, and Mahnomen counties.

The box below shows recent data on tribal membership and the populations on the reservations. It is important to keep in mind that not all people who live on the White Earth and Leech Lake reservations are tribal members, and not all tribe members live on their respective reservation.

| Tribal Membership and Reservation Population |                |                        |
|--|----------------|------------------------|
| Tribe  | Tribal Members | Reservation Population |
| Leech Lake                                   | 9,509          | 11,456                 |
| White Earth                                  | 18,109         | 9,799                  |

NOTES: Tribal membership was reported in tribal publications (Leech Lake in Fiscal Year 2015, White Earth in September 2018). The reservation population reflects U.S. Census Bureau estimates averaged over five years (2013-2017).

As sovereign, self-governing nations, American Indian tribes have the authority to establish a wide range of services and programs for their members. They may also choose to coordinate some services and programs with state and federal government agencies. They may choose to do that in part to obtain state and federal funding.

OLA limited the scope of our review to the opioid Medication-Assisted Treatment (MAT) programs that White Earth and Leech Lake operate.<sup>16</sup> Leech Lake started its program in 2004; it served approximately 162 clients in fiscal years 2018-2019. White Earth established its program in 2017; it served approximately 595 clients in fiscal years 2018-2019.

<sup>14</sup> Minnesota Statutes 2019, 245G.22, subd. 6.

<sup>15</sup> *Ibid.*

<sup>16</sup> The Red Lake tribe established its program in 2017; however, this program is not the subject of our review because it has not received payments for clients to take medications at home. In fact, a representative of the Red Lake MAT program told us its program does not allow clients to take treatment medications at home.

By their choice, Leech Lake and White Earth enrolled their opioid MAT programs with the state and became service vendors.<sup>17</sup> While tribal programs are not required to be licensed by the Minnesota Department of Human Services, if enrolled as vendors with the state, they must demonstrate to the department that their standards for credentialing health care professionals meet, exceed, or are exempt from corresponding state standards.<sup>18</sup>

To receive Medicaid payments for the services they provide, tribal programs must meet certain requirements established in federal law.<sup>19</sup> Also, state Medicaid plans—including the portions related to tribal services—must be reviewed and approved by the federal Centers for Medicare and Medicaid Services (CMS).<sup>20</sup> U.S. Indian Health Service (IHS) periodically publishes rates that are used to pay for services provided at IHS tribal facilities to Medicaid recipients. Federal law specifies that the federal government will pay 100 percent of these payments.<sup>21</sup>

Leech Lake and White Earth have been paid what is called an IHS “encounter rate” for the health services they provide. It is an all-inclusive payment for the services within a category of service (dental, behavioral health, etc.) an individual receives at a health clinic within a day. When tribal providers submit claims to DHS for services provided, it is DHS’s responsibility to review and—if appropriate—pay the claims based on IHS-authorized payment rates and the state’s federally approved Medicaid Plan.

Exhibit 1 shows the total opioid treatment payments to MAT providers and individuals served by the Leech Lake and White Earth programs in state fiscal years 2018 and 2019.

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<sup>17</sup> *Minnesota Statutes* 2019, 254B.03, subd. 1(b), says, “The [Minnesota] commissioner of human services shall select eligible vendors of chemical dependency services who can provide economical and appropriate treatment.” *Minnesota Statutes* 2019, 254B.05, subd. 1(a), says, “American Indian programs that provide substance use disorder treatment, extended care, transitional residence, or outpatient treatment services, and are licensed by tribal government are eligible vendors.”

<sup>18</sup> *Minnesota Statutes* 2019, 256B.02, subd. 7(c).

<sup>19</sup> 42 U.S. Code, sec. 1396j (2019).

<sup>20</sup> 42 CFR, secs. 430.14-430.16 (2019).

<sup>21</sup> 42 U.S. Code, sec. 1396d(b) (2019).

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## **Exhibit 1: Total Medication-Assisted Treatment (MAT) Payments and Enrollment for Leech Lake and White Earth, Fiscal Years 2018 - 2019**

| Tribe  | Number of Individuals who Received MAT Treatment, Fiscal Years 2018-2019 <sup>a</sup> | Total Payments<br>Fiscal Years<br>2018-2019 <sup>b</sup> |
|--|---|--|
| Leech Lake (Cass Lake)<br>White Earth, by Program                | 162   | \$14,404,096   |
| • Maternal Outreach and Mitigation Services (MOMS) (Naytahwaush) | 73  | 9,503,616  |
| • Urban MOMS (Minneapolis)                                       | 38  | 3,446,860  |
| • Oshki Manidoo MAT (Bemidji)                                    | 102   | 9,957,298  |
| • Naytahwaush MAT (Naytahwaush)                                  | 196   | 18,905,486   |
| • White Earth Urban MAT (Minneapolis)                            | 123   | 6,819,128  |
| • White Earth MAT (White Earth)                                  | <u>132</u>  | <u>14,189,680</u>  |
| White Earth Total  | 595   | \$62,822,068   |
| Total  | 752   | \$77,226,164   |

<sup>a</sup> Represents an unduplicated count of individuals who received services for that program during fiscal years 2018 and 2019. Some individuals received services from more than one White Earth MAT program, therefore, the total of individual programs is greater than total reported here.

<sup>b</sup> Totals represent fee-for-service payments from the Consolidated Chemical Dependency Treatment Fund to White Earth and Leech Lake Indian Health Service providers for medical treatment services, and excludes payments from grants for program-related services, such as staff training, data collection and analysis, and program evaluation.

SOURCE: Department of Human Services.

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## **Findings**

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**Finding 1. The Department of Human Services did not have authority to claim federal Medicaid funds to pay White Earth and Leech Lake opioid treatment providers who submitted claims when their patients self-administered medication at home.**

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A complex set of laws, rules, policies, and guidance establish the conditions under which states, Indian tribal health providers, and nontribal health providers may claim

Medicaid funds for health care services.<sup>22</sup> At the federal level, the Centers for Medicare and Medicaid Services (CMS) within the U.S. Department of Health and Human Services administers the federal Medicaid program. In Minnesota, the Department of Human Services (DHS) is responsible for administering the state's Medicaid program (which Minnesota calls Medical Assistance).

To access Medicaid funds for a service, DHS must specify the service in its State Medicaid Plan and obtain approval from CMS for Medicaid funds to be used to pay for that service.<sup>23</sup> DHS must also ensure on an ongoing basis the State Medicaid Plan and the department's programs and payment policies stay aligned with federal and state Medicaid requirements.<sup>24</sup> For example, DHS should track changes in state law related to chemical dependency treatment to ensure they do not conflict with federal Medicaid law and the State Plan. If there are discrepancies, DHS must either promptly submit a State Plan amendment, obtain a program waiver from CMS, or modify its practices.<sup>25</sup>

Medicaid generally pays for services on a fee-for-service basis or through a fixed amount for each individual enrolled in a managed care organization. Tribal health providers may choose another option; they may select to be paid an "encounter rate" the U.S. Indian Health Service (IHS) establishes annually.<sup>26</sup> Under Minnesota's agreement with IHS, tribal health programs enrolled with DHS may receive an encounter rate payment for several categories of health services. For example, a Minnesota tribal health provider can be paid an encounter rate when a client has a counseling session with a therapist, when a client takes a dose of medicine in the presence of a nurse or other health care professional, or when a client has a teeth cleaning by a dental hygienist.

However, DHS payments at the IHS encounter rate—\$427 per day in 2018 and \$455 per day in 2019—to tribal providers who submitted claims for payment when their clients self-administered a treatment drug at home, and not at a clinic, conflicted with

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<sup>22</sup> For example, 42 CFR, sec. 440.90 (2019), requires generally that clinic services "must be furnished at the clinic by or under the direction of a physician...." Services may be furnished outside of a clinic—by clinic personnel under the direction of a physician—to an eligible individual who does not reside in a permanent dwelling or does not have a fixed home or mailing address. Federal guidance expands on this regulation. See U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services, *State Health Official Letter #16-002*, "Federal Funding for Services 'Received Through' an IHS/Tribal Facility and Furnished to Medicaid-Eligible American Indians and Alaska Natives," February 26, 2016, 2; and the related document, U.S. Department of Health and Human Services, Centers for Medicare & Medicaid Services, "Frequently-Asked Questions (FAQs) Federal Funding for Services 'Received Through' an IHS/Tribal Facility and Furnished to Medicaid-Eligible American Indians and Alaska Natives (SHO #16-002)," January 18, 2017, 2 and 5. Also, see *Minnesota Statutes* 2019, 256B.0625, subd. 34; and *Minnesota Rules*, 9505.0210, published electronically August 13, 2013.

<sup>23</sup> 42 CFR, sec. 430.10; 430.14-16; and 440.230 (2019).

<sup>24</sup> 42 CFR, sec. 430.12 (2019).

<sup>25</sup> *Ibid.*

<sup>26</sup> IHS regulations establish "per visit" rates for reimbursement. Minnesota's State Medicaid Plan refers to "encounters" or "encounters/visits" at IHS facilities. *Minnesota Statutes* 2019, 256B.0625, subd. 34(b), refers to the federal "encounter rate."

various DHS rules and requirements.<sup>27</sup> Most notably, since at least January 2011, Minnesota’s federally approved state Medicaid plan has had the following language:

An encounter for a [tribal] or [Indian Health Service] facility means a face-to-face encounter visit between a recipient eligible for Medical Assistance and any health professional at or through an [Indian Health Service] or [tribal] service location....<sup>28</sup>

DHS publishes comprehensive guidance and provides training to health care providers related to covered services and billing processes in order to receive reimbursement for their services. This guidance also lays out the requirement for interaction between the provider and client in order to receive the encounter rate. For example:

- In 2001 and 2007, DHS issued bulletins to providers regarding payment of Indian Health Service rates from the Minnesota Consolidated Chemical Dependency Treatment Fund. The bulletins defined an “encounter” as a “face-to-face treatment episode” and stated that this criterion must be met “for the encounter payment to be authorized and paid.”<sup>29</sup>
- DHS’s provider manual for Minnesota Health Care Programs has had language since at least 2012 that says: “An encounter for a tribal or [Indian Health Service] facility means a face-to-face visit between a recipient eligible for [Medical Assistance] and any health professional at or through an [Indian Health Service] or tribal service location for the provision of [Medical Assistance] covered services....”<sup>30</sup>

The encounter payments DHS made to White Earth and Leech Lake for clients to self-administer opioid medications at home did not involve a face-to-face encounter between the client and a health professional within the clinic. In other words, the DHS payments did not comply with state policies that specified when an encounter rate can be paid.

We could not find, and DHS did not provide, any evidence that anyone at DHS ever sought or obtained authority from a federal agency to use federal funds to reimburse tribes an IHS encounter rate—or any rate—for opioid medication that patients take at home. Further, given federal restrictions on Medicaid claiming for IHS facilities, it seems unlikely that such a request would have been approved.

We discuss in the next sections, however, that DHS also gave different guidance to different opioid treatment providers. This conflicting guidance, and other factors,

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<sup>27</sup> Minnesota Rules, 9505.0210, published electronically August 13, 2013, require that services paid for from Medicaid funds must be “personally furnished by a provider” unless otherwise authorized in the rules.

<sup>28</sup> Department of Human Services, *Medicaid State Plan*, 4.19-B (Methods and Standards for Establishing Payment Rates), Attachment Supplement 2, effective January 1, 2011.

<sup>29</sup> Department of Human Services, *Bulletin 01-51-10: CCDTF Implementation of Encounter Rates*, September 28, 2001; and *Bulletin 07-51-04: CCDTF Implementation of Encounter Rates*, July 19, 2007.

<sup>30</sup> Department of Human Services, *Minnesota Health Care Provider Manual*, September 26, 2012. In a May 9, 2019, revision to the manual, DHS added the following language: “The [Indian Health Service] encounter rate is not available for self-administered medication therapy.”

resulted in DHS reimbursing White Earth and Leech Lake an estimated \$29 million in unauthorized payments.

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**Finding 2. No DHS official—past or present—takes responsibility for deciding that the department could use the U.S. Indian Health Service encounter rate to pay tribal opioid addiction treatment programs for clients to self-administer medications at home.**

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In an April 2019 internal memo, a DHS official said: “The explanation of how/who approved the encounter rate reimbursement for the self-administered prescriptions is unclear.”<sup>31</sup>

Like the department, we could not determine who decided to pay tribes the IHS encounter rate for a client to self-administer medication at home. No one at DHS documented the decision or formulated a written policy to implement the decision. In addition to being a poor management practice, the department’s failure to document its decision violated the Minnesota Official Records Act, which says that agencies “shall make and preserve all records necessary to a full and accurate knowledge of their official activities.”<sup>32</sup>

In addition, no DHS official we interviewed acknowledged making the decision to pay the IHS encounter rate to tribal opioid addiction treatment programs for clients to take medications at home.

The department’s current opioid treatment program expert, Rick Moldenhauer, told us that the decision to pay the tribes the encounter rate grew out of a previously established practice of paying nontribal opioid treatment programs for clients to self-administer medications at home. Moldenhauer said that when he came to work at DHS in 2001 the practice was as follows:

[I]f you’re an OTP [opioid treatment program], a methadone program, we regularly...[paid] for the self-administration of dispensed doses. That has never been an issue and that was the format and the billing process that I inherited when I came here May of 2001.

Other DHS staff confirmed that the practice of paying MAT providers for doses of medicine clients took at home has been in place for nontribal providers for many years—perhaps since the 1990s.

Moldenhauer told us that the decision to apply this practice to the tribes occurred in 2004. At that time, DHS awarded grants to three organizations (the Leech Lake Band of Ojibwe and two nontribal organizations) to foster an expansion of the state’s opioid addiction treatment programs. Moldenhauer said that former chemical health division

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<sup>31</sup> DHS Health Care Administration, memorandum to Deputy Commissioner Claire Wilson and Assistant Commissioner Marie Zimmerman, “MAT Payment Structure for Tribal Providers,” April 3, 2019.

<sup>32</sup> Minnesota Statutes 2019, 15.17, subd. 1.

director Don Eubanks wanted to make sure that billing for take-home medication by tribes would mirror those of nontribal programs.

In an interview with OLA, Eubanks denied any responsibility for payment decisions affecting the tribes. According to Eubanks, he worked on higher-level issues and pushed for policies that would increase the number of tribal opioid addiction treatment providers, but he left detailed decisions about payment levels to other staff.

Given Eubanks' response and the denials of involvement we received from other DHS officials, we interviewed Moldenhauer a second time about the origins of the decision to pay tribes for clients to take medications at home. Moldenhauer continued to insist that Eubanks and others in positions above Moldenhauer were either directly involved in the decision or were aware of the decision to pay tribes the IHS encounter rate for self-administered treatment medications at home.

When we asked Moldenhauer about others' denials, he said no one wants to take responsibility for a decision that has become controversial. In fact, Moldenhauer claimed that DHS officials and others are trying to pin the blame on him. He said:

[T]he impression that I received within DHS and, and outside of DHS, is either myself running with a rogue interpretation of rules and statutes or to the other extreme, individual malfeasance, where I've intentionally somehow engineered this. How? I'm not a business analyst, I'm not a programmer.... The other extreme being malfeasance on my part or that I somehow personally have benefited from this. I have no contractual agreements with any of these organizations, I don't do the assessments, I don't provide the service, I don't receive the, the monies that [are paid]. What happened? I think it became a political issue.

Because Moldenhauer has played a central role for many years in the department's substance abuse treatment programs, we focused significant attention on him. We reviewed a large number of his e-mails, we interviewed him twice under oath, and we asked about Moldenhauer's role and activities in our interviews with other DHS staff and officials. Here is what we concluded about Moldenhauer:

- Moldenhauer is highly regarded inside DHS for his deep knowledge of opioid addiction and treatment programs.
- Moldenhauer was the person tribal representatives came to for advice about establishing opioid addiction treatment programs and about DHS billing policies for those programs.
- Moldenhauer advised tribal representatives that DHS would pay them the IHS encounter rate when clients take opioid treatment medications at home. We discuss the advice he gave in Finding 4.
- Moldenhauer continues to assert that there is a legal basis for DHS to pay tribes the IHS encounter rate for clients to take opioid treatment medications at home.

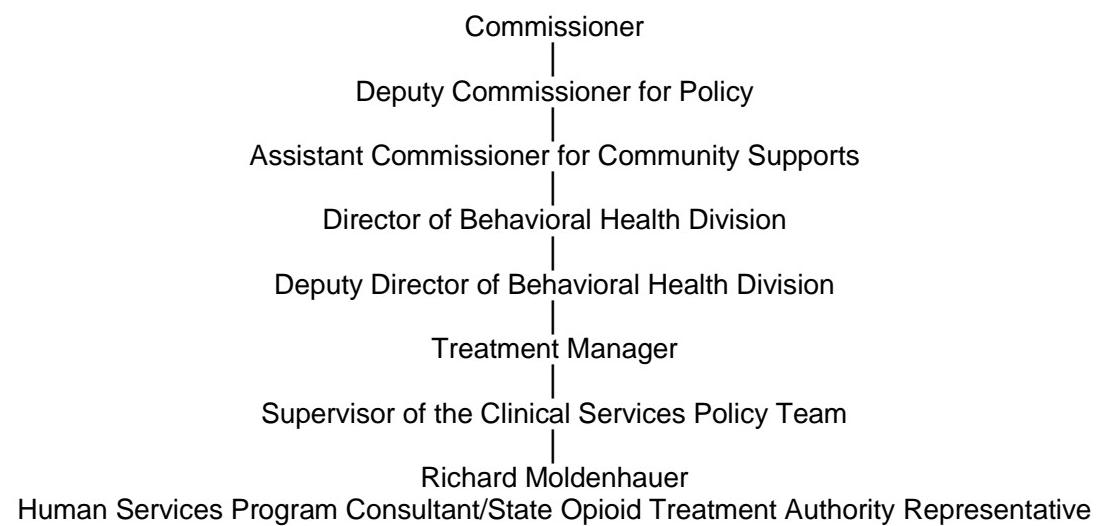
- We have no evidence, however, that Moldenhauer was directly involved in the decision to pay tribes the IHS encounter rate for opioid treatment medications clients took at home.

In addition, we find it highly unlikely that someone at Moldenhauer’s level within DHS could make a decision and implement a process that resulted in \$29 million in unauthorized payments being made to White Earth and Leech Lake.

As shown in Exhibit 2, there are multiple supervisors above Moldenhauer.<sup>33</sup>

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## Exhibit 2: Levels of Supervision over Richard Moldenhauer at the Minnesota Department of Human Services



SOURCE: Department of Human Services Organization Chart, August 2019.

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If we are wrong and Moldenhauer did make and implement the decision to pay White Earth and Leech Lake the IHS encounter rate for clients to take opioid treatment medications at home, all of the supervisors above him—as well as officials in other DHS divisions—clearly failed. They allowed a person far down in DHS’s organization to unilaterally initiate—without legal authority—a payment policy that sent millions of federal funds to those tribes.

Finally, no matter who initiated the payment policy, the fact that DHS officials did not stop the payments and allowed them to continue for several years indicates a level of mismanagement and dysfunction within DHS that is extremely troubling. We discuss this failure in the next finding.

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<sup>33</sup> In addition, Moldenhauer’s position description explicitly requires him to “report on various activities, projects, and outcomes to other managers within the division or department” and to establish goals and reforms using a work plan developed with division management.

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**Finding 3. DHS failed to implement procedures to stop the department from making the unauthorized payments to the White Earth Nation and the Leech Lake Band of Ojibwe.**

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Every well-managed organization designs and implements procedures to ensure that the organization complies with its legal obligations and internal policies. Organizations (and auditors) call these procedures “internal controls.” Controls often require actions by individuals, but controls can also be built into computer systems as decision rules.<sup>34</sup> For example, controls in payment systems establish the criteria for allowing or not allowing a payment to be processed.

Prior to 2012, DHS relied on agreements negotiated between counties/tribes and service providers to establish the amounts the state would pay for chemical dependency treatment services. That complex arrangement may have limited DHS’s ability to establish controls to ensure that the payments it made to the tribes were correct. When DHS established uniform, statewide payment rates, however, it had an opportunity to establish controls that would have stopped unauthorized payments from being made. But, because it failed to establish payment controls, DHS processed unauthorized payments to White Earth and Leech Lake for several years.

According to people we interviewed, this disconnect between payment policy and payment controls resulted from a lack of coordination between the Behavioral Health Division and the Health Care Division, which oversees payments to providers in DHS. For example, Julie Marquardt, Deputy Assistant Commissioner and Assistant Medicaid Director, told us that the Behavioral Health Division has its own rate-setting staff and that her division’s staff “don’t interact with them very much.”

When we asked Marquardt whether officials responsible for the state’s Medicaid program and payment system still have ultimate authority to approve all payment rates, Marquardt said, “I would like to say yes to that question, and, unfortunately, I have to say no to that question.” She said that while the current controversy over DHS payments for take-home opioid treatment drugs is an example of that reality, it is “only one example of this.”

Marquardt said that she has been division director for 5 years and at Health Care Administration for 15 years, and “our presence was not always welcomed” in other areas of the department. She said that officials in other DHS divisions think the Health Care Administration is being “intrusive” if it intervenes. According to Marquardt, there is a culture at DHS of keeping the Health Care Administration out of other divisions’ business.

Multiple DHS officials told us that there is no formal policy that delineates how DHS’s program divisions must interact with the DHS Health Care Administration for purposes of setting and overseeing rates and payments.

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<sup>34</sup> Computer processing rules are also often called “ edits.”

There are other units within DHS that had—or should have had—opportunities to flag the unauthorized payments to the two tribes. For example:

- The department’s Surveillance and Integrity Review (SIRS) unit failed to identify the payments. SIRS is federally required to review Medicaid utilization to safeguard against unnecessary or inappropriate use of Medicaid services and against excess payments.<sup>35</sup>
- The department’s Office of Inspector General (OIG) failed to identify the unauthorized payments. This is particularly troubling since we learned that in 2014, the OIG worked with the Behavioral Health Division to include in DHS’s online Provider Manual explicit instructions for providers to identify and code within their claims submissions when a client self-administers opioid treatment at “home.”<sup>36</sup> Apparently, OIG did not at that time determine whether payments for these types of services for U.S. Indian Health Service (IHS) tribal facilities were actually authorized for federal Medicaid reimbursement and did not conclude that the state’s payment system should be programmed to stop such payments.
- The American Indian Team in the Behavioral Health Division failed to identify the unauthorized payments even though this team was established to work closely with tribes on mental health and addiction issues.<sup>37</sup> However, the director of that team, Don Moore, told us that White Earth and Leech Lake have not asked for the advice of his team on billing issues in recent years. Rather, according to Moore, they have sought advice from Rick Moldenhauer, and he was not always informed of the questions posed by tribes to Moldenhauer. Moore said that had he known that DHS was paying the IHS encounter rate to tribal providers for clients who self-administered medications, it would have been a red flag.

Taken together, the facts we have presented in the findings above indicate a level of dysfunction within DHS that is deeply concerning. As we discuss in the next findings, that dysfunction has seriously harmed the state’s relationship with the White Earth Nation and the Leech Lake Band of Ojibwe.

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**Finding 4. After telling tribes for several years that DHS would pay them the U.S. Indian Health Service encounter rate for medications dispensed to clients to take home, the department reversed its position in 2019.**

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As was the case with other aspects of our review, we had difficulty obtaining documents that showed who at DHS told the tribes the department would pay the

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<sup>35</sup> 42 CFR, sec. 456.3 (2019).

<sup>36</sup> These actions were part of the OIG’s initiative to investigate transportation costs for opioid treatment. See Department of Human Services, Minnesota Health Care Programs Provider Manual, Alcohol and Drug Abuse Services, revised September 11, 2014, 9. These instructions appeared in the “Billing” section of the manual. DHS’s provider training staff have instructed treatment providers to submit claims for all services, including those provided at home.

<sup>37</sup> Minnesota Statutes 2019, 254A.03, subd. 2.

encounter rate for opioid treatment medications clients took at home. We did, however, find several e-mail exchanges between Moldenhauer and tribal representatives.

For example, in a June 28, 2017, e-mail, the billing specialist for the Leech Lake Opioid Treatment Program asked Moldenhauer how many medications the tribe's program could dispense to a client at a time to take at home. In that exchange, the Leech Lake representative specifically asked Moldenhauer how much the department would pay the tribe for each time a client took medication at home. Here is that exchange:

Leech Lake Representative: "Just to verify that I am understanding this correctly. We can dispense 30 days at a time to the client and bill DHS the \$391.00 a day for the 30 days that were dispensed to the client for take homes[?]"

Moldenhauer: "The short answer is yes...."<sup>38</sup>

A more extensive interaction between Moldenhauer and a tribal representative occurred on February 12, 2019. In that exchange, Adam Fairbanks, representing the Red Lake Nation, sent an e-mail to Moldenhauer with the subject line: "Billing for Takeouts." Fairbanks wanted written confirmation from DHS that the tribe could receive an encounter payment for each dose of an opioid treatment medication its program dispensed to a client to self-administer at home.

Moldenhauer responded "yes," Red Lake could receive an encounter rate for medications clients self-administered at home. The department's liaison to Indian tribes, Vernon LaPlante, who was copied on the e-mail, told Red Lake leaders in a February 21, 2019, e-mail to wait for an "official response."

It took the department almost three months to provide Red Lake with an official response. In separate letters sent on May 1, 2019, to the tribal chairmen of Red Lake, Leech Lake, and White Earth, DHS Commissioner Tony Lourey said:

The Minnesota Medicaid State Plan approved by the Centers for Medicare & Medicaid Services defines an encounter for a [tribal] or IHS facility as a face-to-face visit between a recipient and qualifying health care professional. Therefore, reimbursement for self-administered medication does not meet the criteria of a face-to-face visit and is not reimbursable at the federally negotiated IHS encounter rate.<sup>39</sup>

The commissioner's letter not only contradicted the response Moldenhauer had given Red Lake in February, it contradicted the department's long-standing practice of paying White Earth and Leech Lake the IHS encounter rate for clients in the opioid addiction treatment programs to self-administer medications at home.

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<sup>38</sup> In 2017, the IHS encounter rate was \$391.

<sup>39</sup> Tony Lourey, Commissioner, Minnesota Department of Human Services, letter to Eugene Tibbetts, Chairman, White Earth Nation, May 1, 2019; Tony Lourey, Commissioner, Minnesota Department of Human Services, letter to Darrell Seki, Red Lake Tribal Council, May 1, 2019; and Tony Lourey, Commissioner, Minnesota Department of Human Services, letter to Faron Jackson, Chairman, Leech Lake Band of Ojibwe, May 1, 2019.

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**Finding 5. DHS's communications with the White Earth and Leech Lake tribes about its decision to reverse the department's payment policy for opioid treatment medications clients take at home were not timely or respectful.**

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After informing White Earth and Leech Lake that the department was reversing its payment policy on take-home medications, DHS took an additional three months to inform White Earth and Leech Lake that the tribes would have to pay back the millions of dollars in unauthorized payments the department had made to the tribes. In a meeting at DHS headquarters in St. Paul on July 31, 2019, department officials told leaders from both tribes that the tribes would have to pay the money back.

In follow-up letters on August 1, 2019, Acting DHS Commissioner Pam Wheelock sent overpayment notices. The Commissioner told Chairman of the White Earth Tribal Nation Eugene Tibbetts that his tribe would have to reimburse the state \$11,979,279 for the payments the state had made to the tribe for medications clients took at home from 2017 to 2019.<sup>40</sup> Wheelock sent a similar letter to Faron Jackson, Chairman of the Leech Lake Band of Ojibwe, to inform him that his tribe would have to return \$13,338,094 for overpayments from 2014 to 2019.<sup>41</sup>

On August 8, 2019, Acting Commissioner Wheelock sent the tribes letters recognizing that DHS had not provided them with documentation underlying the overpayment amounts and said the 30-day deadline to appeal will begin when the department mails the claims level data and accompanying correspondence.

On August 20, 2019, Acting Commissioner Wheelock acknowledged that DHS “failed to engage in communication, coordination, and formal consultation...as we became aware of a potential overpayment of the [tribe’s] Medication Assisted Therapy program.” She said DHS “took a regulatory stance, approaching your nation as a ‘medical assistance vendor’ rather than as a sovereign nation.” In addition, Wheelock said: “We are confirming that the 30-day deadline to appeal has not started.”<sup>42</sup>

On September 24, 2019, DHS told the tribes that the amounts the two tribes would have to pay back had increased. According to the department’s latest estimates, White Earth would have to pay back about \$14.2 million and Leech Lake would have to pay back about \$14.7 million.<sup>43</sup>

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<sup>40</sup> Pamela Wheelock, Acting Commissioner, Minnesota Department of Human Services, letter to Eugene Tibbetts, Chairman, White Earth Nation, August 1, 2019.

<sup>41</sup> Pamela Wheelock, Acting Commissioner, Minnesota Department of Human Services, letter to Faron Jackson, Chairman, Leech Lake Band of Ojibwe, August 1, 2019.

<sup>42</sup> Pamela Wheelock, Acting Commissioner, Minnesota Department of Human Services, letter to Faron Jackson, Chairman, Leech Lake Band of Ojibwe, August 20, 2019; and Pamela Wheelock, Acting Commissioner, Minnesota Department of Human Services, letter to Michael Fairbanks, Chairman, White Earth Nation, August 20, 2019.

<sup>43</sup> We asked DHS for documentation and officials told us they did not send letters to the tribes but the commissioner met with tribal leaders and informed them of the increase.

Representatives of the White Earth and Leech Lake tribes have criticized DHS not only for providing the tribes with misinformation about their ability to obtain encounter payments, but they have also criticized the way the department has communicated with them about the overpayment problem. The department has accepted that criticism.

Frankly, we think the department's mismanagement of its relationship with White Earth and Leech Lake is worse than Wheelock acknowledged. In a meeting on October 18, 2019, which was prompted by questions we submitted to the department, DHS officials told us they still have not obtained an official determination from federal officials that the payments to White Earth and Leech Lake were overpayments. While we believe the department's determination that the payments were not authorized is correct, and we assume federal officials will also support that determination, we were surprised to learn that the department had not, as of the date of our meeting, obtained a determination from federal officials on such a serious question.

In fact, we learned that the department only recently agreed to seek such a federal determination because White Earth and Leech Lake demanded it. We were told that in response to the tribes' position, DHS has agreed to have a conference call in which DHS, White Earth, Leech Lake, and federal officials will discuss the overpayment issue. However, the department was not sure that the result would be an official, written response from the federal government. In fact, the department was not sure when the conference call would occur or which federal officials would participate.

All of this uncertainty is occurring more than five months after DHS told White Earth and Leech Lake that the payments the department had made to the tribes for clients to self-administer medications at home did not comply with legal requirements. And, it comes over two months after DHS officials told White Earth and Leech Lake that they would have to return millions of dollars to the state because the payments DHS made over several years were not authorized.

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**Finding 6. The State of Minnesota could face challenges in trying to obtain the unauthorized payments DHS made to the White Earth Nation and the Leech Lake Band of Ojibwe.**

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The U.S. Department of Health and Human Services (HHS) can require the State of Minnesota to repay the federal government for overpayment of Medicaid funds.

Federal regulations define overpayments as “the amount paid by a Medicaid agency to a provider, which is in excess of the amount that is allowable for services furnished under section 1902 of the Act and which is required to be refunded.”<sup>44</sup> When the state discovers overpayments, it has one year to recover (or attempt to recover) the overpayments and repay the federal government before HHS can adjust the Medicaid

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<sup>44</sup> 42 CFR, sec. 433.304 (2019).

payments HHS makes to the state.<sup>45</sup> The Secretary of HHS determines the amount CMS may withhold from a state to recover the overpayments.<sup>46</sup>

In addition to federal regulations, *Minnesota Statutes* 2019, 256B.0641, subd. 1(1), requires the commissioner to recover an overpayment when the commissioner or the federal government determines the state has overpaid a medical assistance vendor.<sup>47</sup> *Minnesota Statutes* say this is true even when DHS made the error.<sup>48</sup>

In several important respects, American Indian tribes are different from other medical assistance vendors, but the recovery requirement applies to tribes. As tribal nations, White Earth and Leech Lake have legal authority to establish and license their medication-assisted opioid treatment programs.<sup>49</sup> In addition, the state has an obligation to interact with tribes on a government-to-government basis, unlike how the state interacts with counties, other political subdivisions, or other vendors.<sup>50</sup> Nevertheless, because White Earth and Leech Lake have enrolled their medication-assisted opioid treatment programs with the state to receive Medicaid funding, they are subject to certain federal and state legal requirements and processes, including the recovery provision noted above.<sup>51</sup>

#### *Appeal Process*

Both Leech Lake and White Earth have said they will appeal DHS's determination. In an August 1, 2019, press release, Leech Lake said the band's legal counsel was working to develop a response to the allegations and "will vigorously appeal any determination

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<sup>45</sup> 42 U.S. Code, sec. 1396b(d)(2)(C) (2019).

<sup>46</sup> 42 U.S. Code, sec. 1396b(d)(3)(A) (2019). "The pro rata share to which the United States is equitably entitled, as determined by the Secretary, of the net amount recovered during any quarter by the State or any political subdivision thereof with respect to medical assistance furnished under the State plan shall be considered an overpayment...."

<sup>47</sup> We note that *Minnesota Statutes* 2019, 256B.064, subd. 1c(a), gives the commissioner discretion on whether to recover an overpayment. Nonetheless, *Minnesota Statutes* 2019, 256B.0641, which *requires* the commissioner to recover the overpayment, also includes the phrase "notwithstanding...any law or rule to the contrary," which then supersedes the permissive clause (commissioner *may* obtain repayment) in 256B.064.

<sup>48</sup> *Minnesota Statutes* 2019, 256B.064, subd. 1c(a); and 256B.0641, subd. 1(2).

<sup>49</sup> For a discussion of the legal basis of the tribes' status as sovereign nations, see Research Department, Minnesota House of Representatives, *American Indians, Indian Tribes, and State Government*, January 2017, "Tribal Sovereignty: Limits of State Power," 18-21. For additional information and from a tribal perspective, see National Congress of American Indians, *Tribal Nations and the United States: An Introduction*, (no date), 20-22.

<sup>50</sup> Governor Tim Walz, Executive Order 19-24, "Affirming the Government to Government Relationship between the State of Minnesota and Minnesota Tribal Nations: Providing for Consultation, Coordination, and Cooperation," April 4, 2019.

<sup>51</sup> *Minnesota Statutes* 2019, 254B.05, subd. 1, for example, says, "American Indian programs that provide substance use disorder treatment, extended care, transitional residence, or outpatient treatment services, and are licensed by tribal government are eligible vendors."

that it was improperly overpaid.”<sup>52</sup> White Earth wrote Acting Commissioner Wheelock on August 30, 2019, that it intended to appeal the overpayments.<sup>53</sup>

The tribes may appeal DHS’s decision to recover the funds by filing a written request for a “contested case” hearing no later than 30 days after the commissioner’s notice seeking recovery of the funds.<sup>54</sup> DHS’s communication with the tribes has been so confusing that it is unclear when the 30-day time frame has started or will start. As we noted in the previous section, DHS sent overpayment notices to the tribes on August 1, 2019, but on August 8, 2019 said the 30-day deadline to appeal had not begun.<sup>55</sup>

Once the 30-day clock starts and the tribes file an appeal within that time frame, DHS sets the matter for a contested case hearing before an administrative law judge (ALJ), according to *Minnesota Statutes 2019*, Chapter 14.<sup>56</sup> Following the hearing, the ALJ issues a report containing factual findings, conclusions of law, and recommended decisions to the commissioner.<sup>57</sup>

The commissioner may adopt, reject, or modify findings, conclusions, and recommendations contained in the ALJ’s report.<sup>58</sup> If the tribes disagree with the final decision, they would have 30 days to file an appeal with the Minnesota Court of Appeals.<sup>59</sup>

#### *Equitable Estoppel*

The tribes could try to prevent DHS from recovering the funds based on the premise that they relied on DHS’s advice. Known as “equitable estoppel,” the legal doctrine is

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<sup>52</sup> “Leech Lake Band of Ojibwe Responds to Overpayment Allegations Made by Minnesota Department of Human Services,” *Leech Lake News*, August 1, 2019, <https://www.leechlakenews.com/2019/08/01/media-release-llbo-dhs-overpayment/>, accessed October 24, 2019.

<sup>53</sup> Veronica Newcomer, Tribal Attorney, White Earth Band of Ojibwe, letter to Pamela Wheelock, Acting Commissioner, Department of Human Services, August 30, 2019.

<sup>54</sup> *Minnesota Statutes 2019*, 256B.064, subd. 2(e). See also *Minnesota Statutes 2019*, 256B.064, subd. 2(a), providing certain limited exceptions to the notice and hearing requirements under subd. 2(b) and (d).

<sup>55</sup> One reason DHS contends the 30-day deadline to appeal did not start with the August 1, 2019, overpayment notices is because DHS did not send the letters by certified mail, which is required under *Minnesota Rules*, 9505.2230, subp. 1, published electronically August 12, 2008.

<sup>56</sup> *Minnesota Statutes 2019*, 14.50-14.69.

<sup>57</sup> See *Minnesota Statutes 2019*, 14.58-14.62. After the ALJ issues the report, the record remains open for at least ten days to allow the parties to file exceptions and present arguments to the commissioner. Once the record closes, the commissioner then has 90 days to issue a final decision based on the record.

<sup>58</sup> *Minnesota Statutes 2019*, 14.62. If the commissioner fails to issue a final decision within 90 days of the record closing, the ALJ’s recommended decision becomes the final decision. *Minnesota Statutes 2019*, 14.62, subd. 2a.

<sup>59</sup> *Minnesota Statutes 2019*, 14.63. Although we did not research this legal option, we think it is possible that the tribes could go to federal court to try to block the State of Minnesota from making a repayment claim.

designed to protect a party from taking unconscionable advantage of his own wrong by asserting his strict legal rights.<sup>60</sup>

Courts have discretion on whether to apply estoppel,<sup>61</sup> and whether to do so depends on the facts of each case.<sup>62</sup> Minnesota's Supreme Court has held that a party asserting estoppel against the government bears a "heavy burden of proof."<sup>63</sup> Nonetheless, it can be used against the government if "justice requires" and there is some element of fault or wrongful conduct on behalf of the government.<sup>64</sup>

In order to win on equitable estoppel against the government in Minnesota, the tribes would need to prove:<sup>65</sup>

- (1) Wrongful conduct on the part of the government;
- (2) They reasonably relied on the wrongful conduct;
- (3) They incurred a unique expenditure in relying on the wrongful conduct; and
- (4) A balance of the equities that weigh in favor of estoppel.<sup>66</sup>

The state Supreme Court has held that the first element, "wrongful conduct" on the part of the government, is the most important element of the four.<sup>67</sup> Minnesota's courts have not provided a comprehensive definition as to what is "wrongful conduct" in an equitable estoppel claim against the government. They have decided in several cases, however, that a government official's "simple mistake" is not wrongful in this context;<sup>68</sup> there must be some degree of malfeasance or affirmative misconduct.<sup>69</sup>

We caution against speculating as to whether the tribes would succeed or not succeed with an estoppel claim based solely on the information contained in OLA's report. As

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<sup>60</sup> *Brown v. Minnesota Dep't of Pub. Welfare*, 368 N.W.2d 906, 910 (Minn. 1985) (quoting *N. Petrochemical Co. v. United States Fire Ins. Co.*, 277 N.W.2d 408, 410 (Minn. 1979)).

<sup>61</sup> *Shetka v. Aitkin Cnty.*, 541 N.W.2d 349, 353 (Minn. App. 1995), review denied (Minn. Feb. 27, 1996).

<sup>62</sup> *Northern Petrochemical Co. v. United States Fire Insurance Co.*, 277 N.W.2d 408, 410 (Minn. 1979).

<sup>63</sup> *Nelson v. Commissioner of Revenue*, 822 N.W.2d 654, 660 (Minn. 2012) quoting *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 292 (Minn. 1980).

<sup>64</sup> *Brown v. Minn. Dep't of Pub. Welfare*, 368 N.W.2d 906, 910 (Minn. 1985).

<sup>65</sup> *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 25 (Minn. 2011).

<sup>66</sup> UCLA Law Professor Sam Bray explains the "balance of equities" (also known as the balance of hardships) as taking into consideration the burdens or costs on plaintiff and defendant, degree of fault, and tailoring a solution to the particular case. Professor Bray provides an explanation of the balance of equities at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/02/what-is-the-balance-of-equities/>, accessed October 20, 2019.

<sup>67</sup> *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 293 (Minn. 1980). For context, also see *Department of Human Services v. Muriel Humphrey Residences*, 436 N.W.2d 110, 117 (Minn. Ct. App. 1989), *pet. for rev. denied* (Minn. April 26, 1989).

<sup>68</sup> *North Oaks*, 797 N.W.2d at 25-26 citing *Mesaba Aviation Div. of Halvorson of Duluth, Inc. v. Cnty. of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977); *Kmart Corp. v. County of Stearns*, 710 N.W.2d 761, 771 (Minn. 2006); and *Bond v. Comm'r of Revenue*, 691 N.W.2d 831, 838 (Minn. 2005).

<sup>69</sup> *Kmart*, 710 N.W.2d at 771 (degree of malfeasance); *City of Minneapolis v. Minneapolis Police Relief Ass'n*, 800 N.W.2d 165, 176 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011) (affirmative misconduct).

we mentioned at the beginning of our report, the tribes did not respond to our requests to understand their perspectives on this issue. The tribal documents OLA obtained were those in the state's possession. Given that an estoppel analysis is fact-specific, the tribes could have documents or other evidence that could play a role in whether they would succeed or not succeed in a legal challenge.

## Final Comment

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As the discussion in the findings above clearly show, the financial and legal problems created by the DHS overpayments to White Earth and Leech Lake are going to be difficult to resolve. This is particularly troubling since DHS could have avoided the problems with simple, good management.

The fact that so many DHS management officials allowed the department to make millions of dollars in unauthorized payments over multiple years is inexcusable, as is the department's failure to document important policy decisions. We think fundamental and deep reforms within DHS are needed.

## Recommendations

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**Recommendation 1. The Legislature should by law require the Commissioner of the Department of Human Services to design and implement a comprehensive system of documented management reviews and approvals to ensure that payments made by the department with Medicaid funds comply with state and federal legal requirements.**

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We were surprised—and troubled—to learn that individuals within DHS can make decisions to spend Medicaid funds without review and approval from the DHS officials who are responsible for the state's Medicaid program. Department officials told us that DHS does not have a policy that requires the department's various divisions, offices, and units to obtain approval from Medicaid officials when they make decisions that affect Medicaid spending.

In addition, the department acknowledges that it does not know who made the decisions that led to the department making \$29 million in unauthorized payments using Medicaid funds. Apparently, DHS does not require staff and officials to document their policy decisions—or cite the legal authority for decisions—that spend Medicaid funds.

We normally do not recommend legislation to correct an internal executive branch decision-making process. In this case, the DHS decision-making process was so deficient and created such serious problems that we think legislative intervention and action is necessary.

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**Recommendation 2. The Legislature should clarify in law whether the Department of Human Services has authority to pay a health care provider a service payment when a patient or client self-administers medication outside of the provider's facility.**

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DHS has stopped paying the White Earth and Leech Lake tribes' opioid treatment programs when a client self-administers a treatment medication at home. The department continues, however, to pay nontribal opioid addiction treatment programs when clients self-administer a medication at home. The amounts paid per day are relatively small (\$23) compared to the encounter rate DHS paid the White Earth and Leech Lake tribes. However, because those nontribal payments were not within the scope of our review, we do not know how much has been paid to these programs over the many years the payments have apparently been made.

As with the payments the department made to the White Earth and Leech Lake tribes, we could not find any explicit legal authority for the department to pay nontribal opioid addiction treatment programs when clients take medications at home. In addition, we question the policy basis for the state to pay a health care provider when the provider's client or patient self-administers medication since there is no direct medical service being provided. In fact, we are not aware of any other situation in which the state pays health providers when clients or patients self-administer medications at home; opioid addiction treatment drugs dispensed by treatment providers seem to be a unique example.

Given these facts, we think the Legislature should clarify in law whether the state will (or will not) pay health care providers when their clients self-administer their medications outside of the clinic.

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**Recommendation 3. The Legislature should consider enacting exceptions to the law that requires the Department of Human Services to recover payments to providers that resulted from department errors.**

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The state law that allows the Department of Human Services to recover all payments it erroneously made to providers allows the department to avoid any accountability for egregious mismanagement.

While the law may be justified in many situations, we think the facts presented in this report should be the basis for a legislative reconsideration. Specifically, the Legislature may want to consider whether actions by DHS are so unfounded and erroneous that the pay-back policy should have some exceptions.





**Minnesota Department of Human Services**

**Elmer L. Andersen Building**

**Commissioner Jodi Harpstead**

**Post Office Box 64998**

**St. Paul, Minnesota 55164-0998**

October 28, 2019

James Nobles, Legislative Auditor  
Office of the Legislative Auditor  
Centennial Office Building  
658 Cedar Street  
St. Paul, Minnesota 55155

Dear Legislative Auditor Nobles:

Thank you for the opportunity to review and comment on your office's report titled "*Department of Human Services: Payments for Self-Administered Opioid Treatment Medication*." We appreciate the effort and professionalism of you and your staff as your office completed their work on this Special Review.

Your report confirms my own assumption based on review of the available facts – that the Department is at fault for providing incorrect guidance resulting in this billing error. In particular, your report shows that our Tribal Nation partners provided detailed and transparent billing information of the at-home self-administration to the Department over the years. The Department did not have the internal controls necessary to catch the issue and did not provide correct advice.

In my first week as Commissioner I made a commitment to trustworthiness. I understand that we have significant work ahead of us to rebuild the necessary processes and internal controls that will help us to identify and prevent similar issues in the future. Fortunately, the Department has passionate and talented staff with the expertise to build integrity and compliance in all our processes, with a focus on restoring the public's trust in carrying out the critical mission of providing services to Minnesotans.

The Department also has work ahead to rebuild trustworthiness in our government-to-government relationship with the White Earth Nation and Leech Lake Band of Ojibwe. We are establishing better processes for timely consultation, coordination, and cooperation with our tribal partners.

Below are our responses to the specific recommendations in your report.

**Recommendation 1:**

*The Legislature should by law require the Commissioner of the Department of Human Services to design and implement a comprehensive system of documented management reviews and approvals to ensure that payments made by the department with Medicaid funds comply with state and federal legal requirements.*

Response to Recommendation 1:

While we do not believe enactment of a new law is necessary, we acknowledge that in this area the Department has had decentralized decision making and internal controls were lacking. To address this, the Department has initiated a Continuous Process Improvement and Internal Control Process project to sharpen payment and rate-setting policy and decision-making and to make sure the decisions are properly documented in accordance with current state laws. As part of this project, the Department plans to strengthen its internal controls to include a system of several checks and balances, including requiring high-level approvals for each payment policy decision.

We value continuous improvement and have seen the results of using a continuous improvement model to address deficiencies and inconsistencies in program policies and operations. For example, we have initiated improvements in our Child Care Assistance Program processes using this tool. Continuous improvement is just one tool in the comprehensive compliance framework that we have recently instituted across the agency. We look forward to publicly sharing this model at the upcoming legislative hearings on this topic.

Recommendation 2:

*The Legislature should clarify in law whether the Department of Human Services has authority to pay a health care provider a service payment when a patient or client self-administers medication outside of the provider's facility.*

Response to Recommendation 2:

For payments to tribal providers, the Department disagrees with Recommendation 2, because the Department believes the law is clear at the state and federal level.

For payments to nontribal providers, the rate structure is different, and the Department is committed to examining the issues related to that topic raised in this audit.

Recommendation 3:

*The Legislature should consider enacting exceptions to the law that requires the Department of Human Services to recover payments to providers that resulted from department errors.*

Response to Recommendation 3:

We support a legislative review to allow for exceptions to the repayment requirement when there is department error and good faith reliance on that error by recipients of Department payments. To clarify, state law, specifically, Minnesota Laws 2019, section 256B.0641, subdivision 1(1), requires the Department to collect an overpayment.

Thank you again for the professional and dedicated efforts of you and your staff during this Special Review. The Department's policy is to follow up on all findings to evaluate the progress made to resolve them. If you have any further questions, please contact Gary L. Johnson, Internal Audit Director, at (651) 431-3623.

Sincerely,

/s/  
Jodi Harpstead  
Commissioner





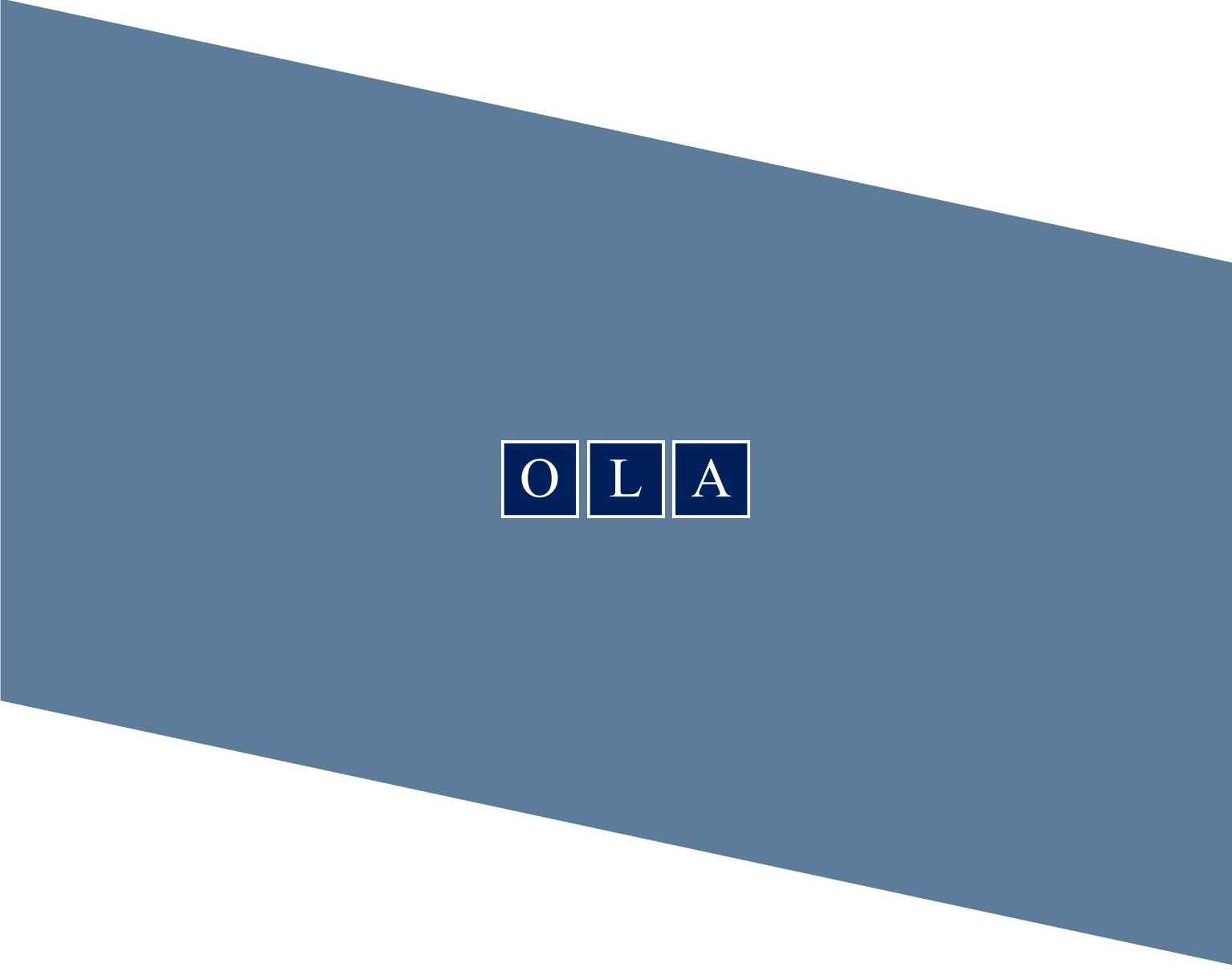
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